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IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane
Company), et al.,

Petitioners,

v.

WILLIAM R. VAN GEMERT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF SPECIAL MASTER

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STATEMENT

This brief is submitted to aid the court in its review of the judgment entered on December 21, 1978 by the United States Court of Appeals for the Second Circuit, sitting en banc reversing the decision of a panel of that court, and affirming a judgment of the United States District Court for the Southern District of New York which ordered that Respondents' attorneys be awarded their fees, expenses and disbursements from the total amount of the judgment rendered against the Petitioners.

BACKGROUND

On July 15, 1958 each shareholder of The Boeing Company ("Boeing") was given the right to purchase $100 of convertible de-

bentures for each 23 shares of stock then held. The debentures were to pay interest of 4-1/2 per cent per annum and were to be convertible by the debentureholders into common stock at a rate (subject to adjustment) of two shares per $100 principal amount of debentures. The Chase Manhattan Bank, N.A. ("Chase") was appointed trustee under the Indenture Agreement. $30,597,600 aggregate amount of unregistered debentures in units of $100, $500, and $1,000 were issued. (No list of the persons to whom the debentures were issued was kept by Boeing or Chase.)

In February 1966, Boeing called the debentures for redemption. April 8, 1966 was fixed as the redemption date and March 29, 1966 was set as the date for

expiration of the conversion privilege. All but the holders of $1,544,300 in debentures were converted by the deadline of March 29, 1966. Thereafter, these non-converting debentureholders brought a consolidated class action in the United States District Court for the Southern District of New York. On July 8, 1977 a Judgment and Order was entered in favor of the Respondents herein, in the principal sum of $3,289,359 together with interest thereon from March 29, 1966 to the date of judgment which amounted to $2,459,646.83 for a total of $5,749,005.83.

That sum was invested on July 21, 1977 in a Certificate of Deposit and designated the Judgment Fund. On October 21, 1977,

$272,613.79 was transferred from the Chase redemption and interest account to the Judgment Fund. An additional $360,040.56 was deposited in the Judgment Fund on December 23, 1977. This deposit included $204,496.43 representing interest on Boeing's unredeemed debentures, $145,851.18 in payment of interest on debentures which had been redeemed since March 29, 1966 and interest of $9,692.95 on the latter two amounts from July 6, 1977. The following is a summary of the sums deposited in the Judgment Fund, interest earned thereon and withdrawals therefrom as allowed by the Court:

Deposits to the Account:		
Boeing Deposit 7/21/77		$5,749,005.83
Transfer from Chase interest A/C 10/21/77		5,867.40
Transfer from Chase redemption A/C 10/21/77		266,746.39
Boeing Deposit 12/23/77		360,040.56
		6,381,660.18
Income Earned on Investments		939,621.91
		7,321,282.09
Less: Payments for Redemption of Bonds and Coupons		204,168.29
		7,117,113.80
Disbursements from the Account:		
Special Master	$58,345.00	
Chase (Services)	3,166.22	
United Service (Printing)	2,747.92	
Doremus & Co. (Advertisement)	49,023.20	113,282.34
Balance 7/18/79		$7,003,831.46

Analysis of Current Balance

Amount	Maturity	Security
$6,885,790.97	7/26/79	Chase Certificate of Deposit 9.625%
109,762.88	8/17/79	Chase Certificate of Deposit 9.70%
8,277.61	-	Cash
$7,003,831.46		

SPECIAL MASTER

Pursuant to the Judgment and Order of the District Court dated July 6, 1977, the undersigned was appointed Special Master and vested with the following powers:

> ...all the powers enumerated in Rule 53 of the Federal Rules of Civil Procedure to direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same, direct the giving of notices to interested persons of hearings on disputed claims, conduct the necessary hearings,submit reports thereon and in general supervise the administration of the Judgment and decide all disputed questions of law and fact connected therewith subject to confirmation by the Court; all expenses incurred by the Special Master, including his fee, shall be paid out of the Fund;...

My primary duty was to identify and locate the holders of $1,544,300 of debentures who constituted the class of non-converting debentureholders eligible to participate in the Judgment Fund. That task was not an easy one since the debentures were unregistered. However, Chase had kept a record in the form of redemption slips which showed that after March 29, 1966, $1,320,000 in debentures had been redeemed. Presumably, $224,300 in debentures were still outstanding.

With Court approval Chase was retained by me to assist in the administration and distribution of the Judgment Fund. From the redemption slips which contained the (i) name and address of the person or firm who submitted each debenture for

redemption, (ii) serial number of every debenture, (iii) date of redemption and (iv) amount remitted in payment, a Master List was prepared. Names and addresses supplied by Counsel for the parties as well as those of persons who had corresponded with Chase concerning the debentures were added to the Master List. All but a relatively few of the redemptions occurred in the remaining months of 1966 and early part of 1967. Of those the majority were by banks and brokerage houses, acting on behalf of their clients whose names and addresses with few exceptions, were not disclosed.

In March 1978 Notices and Proofs of Claim were mailed to those whose names and addresses appeared on the Master List.

A separate notice was also sent to banks and brokerage firms on the Master List requesting them to transmit copies of the Notice and Proof of Claim to their clients. Simultaneously, a Notice was published once a week for three consecutive weeks in the New York Times and the Wall Street Journal (National Edition). Proofs of Claim were to be filed no later than September 1, 1978.

On July 20, 1978 I served and filed a Petition with the United States District Court for the Southern District of New York requesting that an Order be entered extending the time for filing Proofs of Claim to March 1, 1979. At that time there was then pending before the United States Court of Appeals for the Second

Circuit a petition for en banc reconsideration of a panel decision which precluded recovery of Respondents' attorneys' fees and expenses from the unclaimed portion of the Judgment Fund. Until that issue was determined and the amount thereof fixed by Court order there could be no distribution of the Judgment Fund. More importantly, additional time was needed to identify and locate debentureholders, since by July 15, 1978 only Proofs of Claim accounting for $290,000 in debentures had been filed. The Court granted my petition and the time for filing Proofs of Claim was extended to March 1, 1979.

Redemptions effected by banks and brokerage houses was and remains the main

problem. Their customers account for nearly all of the debentureholders who have not been identified or located. Trying to identify their clients was impeded by the fact that records were not kept going back to 1966 and 1967. Moreover, during that span of time many brokerage firms ceased doing business, and like several banks, merged or were acquired by other institutions. New York City banks acted, in the main, on behalf of correspondent banks throughout the country.

In depth research of the files at Chase aided by the finding of the actual debentures redeemed after March 29, 1966 led to the discovery of additional debentureholders. Boeing lent its assis-

tance by publishing a Notice in its quarterly report to stockholders. With court approval a professional search firm was hired to locate those to whom Notices and Proofs of Claim were sent but returned as undeliverable by the Postal Service. Both by mail and telephone those debentureholders who failed to file Proofs of Claim were urged to do so. Where possible, banks and brokerage firms were furnished with copies of communications with Chase as an aid in their search efforts.

As a consequence of the foregoing, the number of claims filed increased significantly and justified a further extension of time for filing Proofs of Claim to September 1, 1979. At the same time

the issue of the allocation of Respondents' counsel fees and expenses was still before the Court thereby barring a distribution of the Judgment Fund. The same factors would justify additional time being granted for the filing of Proofs of Claim.

As of July 18, 1979 Proofs of Claim accounting for $706,600 in debentures have been filed and processed. Of this amount, $33,200 in debentures are awaiting additional information or documentation in support of the Proofs of Claim presented. Although identified and located, persons representing $128,700 in debentures still have not filed Proofs of Claim. Returns by the Postal Service amount to $84,000 in debentures. Unidentified debenture-

holders who redeemed through brokerage firms and banks represent $593,600 in debentures. $31,200 face amount of debentures are still outstanding.

Dated: New York, New York
July 19, 1979

Respectfully submitted,

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